

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LARRY BELL,	)	No. C 09-03497 JW (PR)
	)	
Plaintiff,	)	ORDER OF DISMISSAL WITH
	)	LEAVE TO AMEND
v.	)	
	)	
M. MCVAY, et al.,	)	
	)	
Defendants.	)	
_____	)	(Docket No. 2)

Plaintiff, an inmate at Salinas Valley State Prison (“SVSP”), filed a pro se civil rights complaint under 42 U.S.C. § 1983, challenging the conditions of his confinement while incarcerated at that facility in Monterey County Superior Court. Defendants removed the action to this Court and have filed a notice of removal and motion to screen the complaint under 28 U.S.C. § 1915A.

Removal appearing proper, defendants’ motion to screen the complaint (Docket No. 2) is GRANTED. The Court will conduct its initial review of the complaint pursuant to 28 U.S.C. § 1915A.

### DISCUSSION

#### A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners

1 seek redress from a governmental entity or officer or employee of a governmental entity.  
2 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and  
3 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief  
4 may be granted, or seek monetary relief from a defendant who is immune from such  
5 relief. Id. at 1915A(b)(1),(2).

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a person  
7 acting under the color of state law committed a violation of a right secured by the  
8 Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988). Pro se  
9 pleadings must be liberally construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696,  
10 699 (9th Cir. 1990).

11 B. Plaintiff's Claim

12 Plaintiff claims that upon his arrival at the prison, SVSP prison officials  
13 confiscated certain items from his property that were not allowed at the level IV  
14 institution. Plaintiff, who is African-American, alleges that the confiscation of property  
15 violated his Fourteenth Amendment right to Equal Protection because two other inmates  
16 of a different race, i.e., "Mexican," were allowed to retain similar property, *e.g.*, a radio,  
17 cd player with tape, surge protector and clock, although they are all housed in the same  
18 building facility.

19 When challenging his treatment with regard to other prisoners, courts have held  
20 that in order to present an equal protection claim a prisoner must allege that his treatment  
21 is invidiously dissimilar to that received by other inmates. More v. Farrier, 984 F.2d 269,  
22 271-72 (8th Cir. 1993) (absent evidence of invidious discrimination, federal courts should  
23 defer to judgment of prison officials); Timm v. Gunter, 917 F.2d 1093, 1099 (8th Cir.  
24 1990) (same).

25 This applies to claims of racial discrimination: "Prisoners are protected under the  
26 Equal Protection Clause of the Fourteenth Amendment from invidious discrimination  
27 based on race." Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (citation omitted).  
28 Invidious racial discrimination such as racial segregation, which is unconstitutional

1 outside prisons, also is unconstitutional within prisons. See Johnson, 543 U.S. at 505-06.  
2 A prison classification based on race is immediately suspect and is subject to the same  
3 strict scrutiny as a racial classification outside prison. See id. at 508-10 Prison officials  
4 must therefore demonstrate that the race-based policy or action is narrowly tailored to  
5 serve a compelling state interest. Id. at 510-11. Johnson did not rule out race-based  
6 classifications and did not eliminate prison security as a reason for such classifications,  
7 but instead determined that prison officials must demonstrate that race-based policies are  
8 narrowly tailored to address a compelling government interest such as prison security.  
9 See id. at 511-13, 513; see also id. at 515 (remanding case for determination of whether  
10 CDC's policy of temporarily segregating inmates by race when they arrive in the prison  
11 system initially or are transferred to a new prison is narrowly tailored to serve a  
12 compelling state interest).

13 Furthermore, a claim of racial discrimination under the Equal Protection Clause  
14 requires demonstration of discriminatory intent. Washington v. Davis, 426 U.S. 229,  
15 239-40 (1976); Jeffers v. Gomez, 267 F.3d 895, 913-14 (9th Cir. 2001) (reversing denial  
16 of summary judgment based on qualified immunity on claim that prison guard targeted  
17 black inmates while shooting to quell prison riot; because plaintiff alleged only that  
18 defendant shot at him, it was irrelevant that all but one of the inmates shot and all inmates  
19 suffering serious stab wounds in Hispanic-black riot were black). But cf. Walker v.  
20 Gomez, 370 F.3d 969, 973-74 (9th Cir. 2004) (plaintiff need not prove discriminatory  
21 intent or impact of policy or practice he is challenging if policy is suspect on its face;  
22 policy explicitly treating inmates differently by race suspect on its face).

23 Plaintiff has failed to state a claim upon which relief may be granted with respect  
24 to his equal protection claim because he has failed to demonstrate that prison officials  
25 confiscated his property based on an unlawful race-based policy and that they did so with  
26 discriminatory intent. Plaintiff shall be given leave to amend to attempt to allege facts  
27 sufficient to show that defendants were maintaining a race-based policy which resulted  
28 in the unlawful confiscation of his personal property, and that the policy is the result of

1 invidious discrimination.

2 In the absence of such a race-based policy, plaintiff's claim of unlawful  
3 confiscation of personal property fails to state claim for it is well established that neither  
4 the negligent nor intentional deprivation of property states a due process claim under §  
5 1983 if the deprivation was random and unauthorized. See Parratt v. Taylor, 451 U.S.  
6 527, 535-44 (1981) (state employee negligently lost prisoner's hobby kit), overruled in  
7 part on other grounds, Daniels v. Williams, 474 U.S. 327, 330-31 (1986); Hudson v.  
8 Palmer, 468 U.S. 517, 533 (1984) (intentional destruction of inmate's property). The  
9 availability of an adequate state post-deprivation remedy, *e.g.*, a state tort action,  
10 precludes relief because it provides sufficient procedural due process. See Zinermon v.  
11 Burch, 494 U.S. 113, 128 (1990) (where state cannot foresee, and therefore provide  
12 meaningful hearing prior to, deprivation statutory provision for post-deprivation hearing  
13 or common law tort remedy for erroneous deprivation satisfies due process); King v.  
14 Massarweh, 782 F.2d 825, 826 (9th Cir. 1986) (same). California law provides such an  
15 adequate post-deprivation remedy. See Barnett v. Centoni, 31 F.3d 813, 816-17 (9th Cir.  
16 1994) (citing Cal. Gov't Code §§ 810-895). Accordingly, plaintiff's intentional tort claim  
17 is DISMISSED.

## 18 19 CONCLUSION

20 For the foregoing reasons, the Court orders as follows:

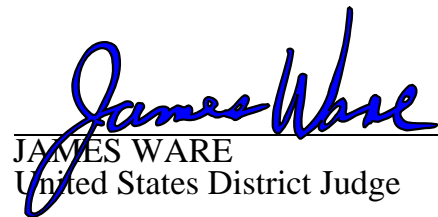
21 1. The complaint is DISMISSED with leave to amend, as indicated  
22 above. Within **thirty (30) days** of the date this order is filed, plaintiff shall file an  
23 amended complaint. The amended complaint must include the caption and civil case  
24 number used in this order and the words "AMENDED COMPLAINT" on the first page  
25 and write in the case number for this action, Case No. C 09-03497 JW ( PR). Because an  
26 amended complaint completely replaces the original complaint, plaintiff must include in it  
27 all the claims he wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir.  
28 1992). Plaintiff may not incorporate material from the original complaint by reference.

1           2. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
2 Court informed of any change of address by filing a separate paper with the clerk headed  
3 "Notice of Change of Address." He must comply with the Court's orders in a timely  
4 fashion or ask for an extension of time to do so. Failure to comply may result in the  
5 dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

6           The clerk shall enclose a copy of the court's form complaint with a copy of this  
7 order to plaintiff.

8           This order terminates Docket No. 2.

9  
10 DATED:       December 9, 2009

  
JAMES WARE  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

LARRY BELL,

Plaintiff,

v.

M. MCVAY, et al.,

Defendants.

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Case Number: CV09-03497 JW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 12/18/2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Larry Bell C-08104  
Salinas Valley State Prison  
P. O. Box 705  
Soledad, Ca 93960-1020

Dated: 12/18/2009

Richard W. Wieking, Clerk  
/s/ By: Elizabeth Garcia, Deputy Clerk